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IN THE

Supreme Court of the United States

October Term, 1991

SPECTRUM SPORTS, INC., *et al.*,
Petitioners,

vs.

SHIRLEY MCQUILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton (collectively "Spectrum") ask the Court to

(1) confirm for all circuits in the United States that an attempt to monopolize claim requires proof of each of the following elements: (a) predatory, or anticompetitive, conduct, (b) specific intent to monopolize, and (c) a dangerous probability of success of monopolization. *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951); *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); and

(2) reverse the Court of Appeals for the Ninth Circuit which affirmed an attempt to monopolize judgment by clinging to the rule first announced in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); a rule which allows dangerous probability of success to be inferred from evidence of specific intent to monopolize, which may, in turn, be inferred from evidence of anticompetitive, or predatory, conduct. *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

The *Lessig* rule's double inference eliminates the inquiry into the dangerous probability of success element and even permits a jury to disregard its determination that a defendant lacked market power. When a plaintiff is excused from having to prove dangerous probability of success, a defendant may be improperly punished for conduct which may amount to, at most, a tort. A fundamental flaw of the *Lessig* rule is its failure to recognize the distinction between unilateral conduct and

concerted action inherent in sections 1 and 2 of the Sherman Act which, by design, encourages one competitor to outperform another. The *Lessig* rule disregards the stricter scrutiny section 2 claims must receive to protect lawful, vigorous business conduct.

McQuillan acknowledges the *Lessig* rule is unique to the Ninth Circuit, but argues the dangerous probability of success element is not necessary where anticompetitive conduct can be shown. McQuillan offers no convincing reason or sound justification for the continued vitality of the *Lessig* rule. In an effort to salvage the *Lessig* rule, McQuillan extracts phrases from commentators who, although rejecting the *Lessig* rule, support a limited market analysis in very rare attempt cases of which this case is not one. Further, McQuillan relies on language from a handful of cases to create what she claims is a "proper application" of the *Lessig* rule. There can be no "proper application" of an improper rule.

ARGUMENT

I. THE *LESSIG* RULE PUNISHES A BUSINESS FOR CONDUCT WITHOUT ADEQUATELY CONFIRMING THAT SUCH CONDUCT ACTUALLY OR POTENTIALLY HARMS COMPETITION.

McQuillan acknowledges that proof of a dangerous probability of success is an essential element of an attempt to monopolize claim. Brief on the Merits by Respondents at 24 [hereinafter Respondents' Brief]. McQuillan also acknowledges that to the extent the *Lessig* rule eliminates the dangerous probability element, "it violates basic antitrust principles". Respondents' Brief at 26 (citing *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007 (White, *J.*, dissenting), *reh'g denied*, 471 U.S. 1170 (1985)).

McQuillan then acknowledges that in the Ninth Circuit alone, a jury may infer dangerous probability of success in either of two ways:

> 1) market power and anticompetitive conduct (as in every circuit); and
>
> 2) conduct that is predatory and clearly restrains competition.

Respondents' Brief at 27.

The first "inference" is, in fact, not an inference, but another way of stating direct proof of a dangerous probability of success. *See Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 177 (1965). In such a case, the jury need not infer anything. The jury will have evidence of a dangerous probability of success when it is provided information about the impact the anticompetitive conduct has on a relevant market. Direct proof of the dangerous probability element is required in every other circuit and is endorsed by commentators in almost every instance.

McQuillan's "second" (only) category of Ninth Circuit inferences is the classic *Lessig* formulation which permits a jury to infer a dangerous probability of success in monopolizing solely from conduct. The *Lessig* rule harms competition by dispensing with the dangerous probability element. There is no justification for such a rule.

A. McQuillan Disregards The Different Treatment Of Unilateral Conduct And Concerted Action Inherent In The Antitrust Laws.

McQuillan's analysis ignores the different treatment of section 1 concerted activity claims and section 2 unilateral activity claims. Unilateral activity is analyzed more cautiously, because the consequences of single firm conduct cannot be judged without a proper frame of reference—the single firm's relevant geographic and product market. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984).

McQuillan tries to sidestep *Copperweld* by stating section 1 and section 2 have the same purpose—to protect competition and deter anticompetitive conduct. Respondents' Brief at 32. However, McQuillan fails to recognize that competition is protected by the requirement of direct proof of dangerous probability of success. In *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987), the court rejected plaintiff's request that the court adopt the *Lessig* rule and held:

> Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.
>
> * * *

> Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture. . . .

Id. at 791.

McQuillan, however, analyzes her attempt to monopolize claim as if it were a section 1 violation, and argues that the Court should approve the *Lessig* rule because it is consistent with the Court's rationale in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) and *National Collegiate Athletic Ass'n. v. The Board of Regents*, 468 U.S. 85 (1984) [hereinafter NCAA]. Respondents' Brief at 28.

McQuillan's reliance on these two cases is misplaced. In both cases, a market analysis was performed. In *Indiana Federation of Dentists* the FTC found that in two specific locales within the State of Indiana, dentists associated with the Federation "constituted heavy majorities of the practicing dentists." *Indiana Fed. of Dentists*, 476 U.S. at 460. The Court not only looked at the adverse effects on competition in that particular market, but also considered that "markets for dental services tend to be relatively localized," and, therefore, the restraint on competition was unreasonable, even in the absence of "an elaborate market analysis." *Id.* at 461. In *NCAA*, the district court defined the relevant market as telecasts of college football games. *NCAA*, 468 U.S. at 111-12. This market definition was supported by the district court's findings "that inter-collegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." *Id.*

McQuillan claims that the Court's "quick look" analysis of a defendant's market power in *Indiana Federation of Dentists* and *NCAA* shows a willingness by the Court to accept inferential proof of an undue effect on competition as a surrogate to a full-blown market analysis, Respondent's Brief at 28. McQuillan is incorrect. In *NCAA and Indiana Federation of Dentists*, the Court engaged in a limited market analysis to determine if the traditional *per se* rule for the conduct in question (horizontal price-fixing in *NCAA* and group boycott in *Indiana Federation of Dentists*) should be applied. In effect, the Court required a market analysis for claims of a type where, previously, no market analysis was required. *NCAA* and *Indiana Federation of Dentists* demonstrate the increased and expanded importance of direct proof of the effects of conduct in a relevant market, not the Court's willingness to relax its requirement of direct proof.

B. The *Lessig* Rule Is Not Followed In Any Other Circuit.

McQuillan acknowledges the *Lessig* rule is not endorsed by any other circuit. Respondents' Brief at 24. The only case outside the Ninth Circuit upon which Plaintiff relies for support of the *Lessig* rule is *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159 (10th Cir. 1986). McQuillan refers the Court to *dicta* in *Shoppin' Bag*, but disregards the holding. In *Shoppin' Bag*, the court instructed the jury that dangerous probability of success is a distinct element to be proved for a successful attempt to monopolize case. *Id.* at 162. Evidence of market shares was introduced, and the jury found such evidence insufficient to find a dangerous probability of success. *Id.* at 161. The Court of Appeals approved the trial court's jury instruction and affirmed the judgment.

C. Commentators Do Not Advocate The Elimination Of The Dangerous Probability Requirement For Conduct Of The Type Alleged Against Spectrum.

McQuillan suggests that Areeda and Turner's formulation of a "limited per se rule of attempted monopolization" should apply to this case. However, Areeda and Turner not only reject the *Lessig* rule, but specifically state their proposed rule would only apply to a small category of cases in which legitimate competitive activity cannot occur, *e.g.*, fraudulent procurement of an invalid patent, reckless patent infringement, and predatory pricing. Phillip Areeda and Donald F. Turner, *Antitrust Law* §836(b), at 352-53 (1978). A resale price maintenance agreement is not the type of conduct to which their proposed rule would be applied. In fact, Professors Areeda and Turner state that resale price maintenance can never support an attempt to monopolize claim because "[r]esale price maintenance is simply not sufficiently close to that actual or threatened expansion of market power which is the key concern of monopolization or attempt prohibitions." *Id.* §828(d), at 326-327.

Professor Hovenkamp also confines his "limited per se rule" to the types of conduct condemned by Areeda and Turner. Herbert Hovenkamp, *Economics and Federal Antitrust Law* §6.5, at 169 (1985). Hovenkamp recognizes that "[o]ften the simplest way to assess the danger a defendant's conduct poses is to examine the market in which the alleged attempt occurred."[1] *Id.* §6.4, at 166.

[1] McQuillan relies upon *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), and *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983).

(Footnote continued on following page.)

D. The *Lessig* Rule Is Wrong And, Therefore, Cannot Be "Properly Applied."

McQuillan now stresses that a "proper application" of the current *Lessig* rule sufficiently conforms with the law of all other circuits. Respondents' Brief at 33. Stated differently, McQuillan asks the Court to limit the harm from a Ninth Circuit rule rejected by this Court and every other circuit. The correct approach is to dispense with *Lessig* and use the rule adopted by this Court and every other circuit.[2] In point of fact, Spectrum requested the very jury instruction that McQuillan now argues

(Footnote continued from preceding page.)

cert. denied, 465 U.S. 1100 (1984) for the proposition that certain types of single-firm conduct by firms without market power approaching a monopoly are sufficiently dangerous to form the basis of an attempt to monopolize. However, in *American Airlines*, the court found a dangerous probability that American would monopolize the relevant market because American's conduct was seen as "uniquely unequivocal and its potential, *given the alleged market conditions*, as being uniquely consequential" if Braniff had consented to the agreement. *American Airlines, Inc.*, 743 F.2d at 1119 (emphasis added).

Similarly, in *Multiflex*, the court required, and the jury found, a dangerous probability of Moore successfully monopolizing the market at the time the anticompetitive acts occurred because Moore controlled eighty percent of the relevant market. *Multiflex, Inc.*, 709 F.2d at 984.

[2] If the Court rejects the *Lessig* rule, McQuillan asks the Court to remand the section 2 verdict to the Court of Appeals for a determination as to whether or not the erroneous attempt to monopolize instruction was prejudicial. Respondents' Brief at 45-47. But this Court has held that, if one of the alternative grounds for a general verdict is legally insufficient, the verdict may not be affirmed. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods., Co.*, 370 U.S. 19, 29-30 (1962). Moreover, as suggested by the Solicitor General (Brief for the United States as *Amicus Curiae* on Petition For Writ of Certiorari) the verdict should be reversed because the trial court never instructed the jury on the need to prove antitrust injury—injury to competition in accordance with *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

turns an "improper" *Lessig* rule into a "proper application" of *Lessig*. At trial (R. 3915) and on appeal (McQuillan's Answering and Reply Brief at 30), McQuillan argued against such an instruction. The trial court agreed not to give it (R. 3915), and the Court of Appeals affirmed. Pet. App. A1-A28.

By denouncing the *Lessig* rule and its "modifications," the Court can cure the different opinions emanating from within the Ninth Circuit and bring the Ninth Circuit into line with the other circuits. Such a decision would promote the judicial interests of maintaining certainty in business transactions and the preservation of judicial resources with which Respondents claim to be concerned. Respondents' Brief at 32. Professor Milton Handler found:

> [In the Ninth Circuit], the relegation of the dangerous probability requirement to second-class citizenship has encouraged a veritable avalanche of litigation, almost none of which has turned out to be meritorious, even without the plaintiffs having to prove dangerous probability. Since *Lessig* was decided, the Ninth Circuit has entertained over one-third of all appeals reported on attempted monopolization in all the circuit courts in the United States.

Milton Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1356 (1982).

II. SPECTRUM'S CONDUCT DID NOT HARM COMPETITION.

The antitrust laws were enacted for the protection of competition, not competitors. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Therefore, injury to competition must be shown before antitrust remedies become available. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

While McQuillan initially pays lip service to these underlying concepts, she jettisons them in her analysis of this case. McQuillan was an exclusive distributor of Sorbothane within a specified geographical area. Pl. Ex. 4, R. 214-15. McQuillan's distributorship was terminated by the manufacturer, and her territory given to another exclusive distributor, Spectrum. A substitution of distributors does not harm competition. *E.g., A.H. Cox Co. v. Star Mach. Co.*, 653 F.2d 1302 (9th Cir. 1981); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), (*en banc*), *cert. denied*, 439 U.S. 946 (1978). McQuillan offered no contradictory evidence proving harm to competition.

III. SPECTRUM DID NOT ENGAGE IN ANTICOMPETITIVE CONDUCT.

The foundation upon which the *Lessig* double inference is constructed—proof of anticompetitive conduct—is wholly insufficient in this case. McQuillan now claims Spectrum participated in horizontal price fixing and horizontal market allocation agreements with IEM Orthopedics Inc. ("IEM") (Hamilton-Kent's medical distributor), and a resale price maintenance agreement with Hamilton-Kent Manufacturing Co. ("H-K"). Respondents' Brief at 18, n. 17. The record below contains no allegation that Spectrum engaged in any illegal horizontal activities, and the jury exonerated Spectrum on McQuillan's claim of resale price fixing.

McQuillan's Second Amended Complaint does not allege, and McQuillan introduced no evidence at trial, that Spectrum participated in any illegal horizontal activity. In fact, the jury found Spectrum did not violate the California statute prohibiting concerted activity in restraint of trade. J.A. 411.

McQuillan's argument is solely one of convenience. Before the Court of Appeals and in her response to motions for *JNOV* and new trial, McQuillan claimed IEM's medical market and Spectrum's athletic market were "different submarkets" and their products were "not functional substitutes."[3] McQuillan Answering and Reply Brief at 37; McQuillan Brief in Opposition to Motion for *JNOV* and New Trial, at 31-32. Parties operating in different markets are not competitiors and,

[3] McQuillan apparently advances this "conspiracy" argument for the first time in an attempt to address the Solicitor General's concern that there was not a multiplicity of actors in McQuillan's section 1 claims as required by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Brief for the United States as *Amicus Curiae* (on Petition for Writ to Certiorari) at 13-15.

therefore, cannot be found liable for participation in illegal horizontal activity. See *United States v. Topco Assocs., Inc.*, 465 U.S. 596, 607-08 (1972).

McQuillan also argues Spectrum engaged in a resale price maintenance agreement with H-K, but ignores the jury verdict to the contrary. McQuillan blames the contrary jury verdict upon an erroneous jury instruction which she herself proposed. When read in its entirety (R. 4328-332), the instruction allows a jury to return a resale price fixing verdict against Spectrum were the evidence sufficient, and hence there is no error. *See Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1431 (9th Cir. 1986).

CONCLUSION

For all the foregoing reasons, and the reasons contained in their Brief on the Merits, Petitioners Spectrum Sports, Inc. and Kenneth B. Leighton respectfully request this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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